

1415394 (Migration) [2015] AATA 3220 (17 July 2015)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Miss Dragana Durdic
CASE NUMBER:	1415394
DIBP REFERENCE(S):	CLF2013/301458
MEMBER:	Amanda Goodier
DATE:	17 July 2015
PLACE OF DECISION:	Perth
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211 and cl.820.221 of Schedule 2 to the Regulations • r.2.03A

Statement made on 17 July 2015 at 4:15pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 22 August 2014 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 2 December 2013 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied the parties had been in a de facto relationship in the 12 months prior to the lodging of the application.
4. The applicant and sponsor appeared before the Tribunal on 7 July 2015 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor's mother. The Tribunal hearing was conducted with the assistance of an interpreter in the Serbian and English languages.
5. The applicant was represented in relation to the review by her registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

7. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australia citizen.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

8. 'De facto partner' is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
9. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.
10. The Tribunal is satisfied on the evidence provided that the parties are not related by family.

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13. *Financial aspects of the relationship*

14. The evidence before the Tribunal is that the applicant was employed in Serbia and Australia and the sponsor in Australia. There is evidence before the Tribunal that upon the applicant returning to Serbia in April 2013, the sponsor provided her with financial support as she was dismissed from her employment while she was in Australia.
15. The parties have a joint bank account into which the sponsor's salary was deposited while she was working in Australia. They gave evidence that they share day to day expenditure and pool their resources. The sponsor has sent money to the applicant for the wedding later this year to be held in Serbia.
16. The Tribunal acknowledges that it is difficult for 2 parties who have been residing in different countries to jointly purchase assets and establish joint bank accounts. However the Tribunal notes that during the time the applicant was living with the sponsor in Australia; they opened a joint bank account and shared their financial resources.
17. The Tribunal is satisfied on the evidence provided that the financial aspects of this relationship evidence a spousal relationship and that there is a pooling of financial resources and sharing of day to day expenses.

18. *Nature of the household*

19. The evidence before the Tribunal indicates that the parties met at a wedding in Serbia in July 2012 and started going out together. The sponsor then went on a prearranged tour through Europe, talking to the applicant daily. He rearranged his flights to return to Serbia where he stayed with the applicant at her grandmother's home for about 7 days before he was required to return to Australia for work commitments. The sponsor works an 8on/6off shift and returned in December 2012 to spend time again with the applicant at her grandmother's home. In April 2013 the applicant arrived in Australia on a visitor visa, staying for 2 months before returning to Serbia. She returned to Australia on 6 November 2013, departing on 11 December 2013 before returning on 29 January 2014. The applicant departed Australia on 8 March 2014 and returned about 2 months later before departing again to travel to Thailand on 12 December 2014 where the sponsor proposed.
20. During the time the applicant resided in Australia with the sponsor, they lived with his parents. The sponsor's mother told the Tribunal that they lived as a couple, were responsible for their own household and contributed to the family household.
21. The evidence before the Tribunal indicates that during the time they lived with the applicant's grandparents in Serbia they were responsible for their own household.
22. The Tribunal is satisfied on the evidence before it that during the times the parties lived together, the nature of the household, sharing of housework and the parties' living arrangements are indicative of a spousal relationship.

23. *Social aspects of the relationship*

24. The parties gave evidence that from the time they commenced their relationship they have held themselves out as a couple and that continues. The Tribunal finds that the parties have provided statutory declarations from family and friends attesting that the relationship

between the parties is a genuine, caring and loving one. The statements refer to the parties holding themselves out as a couple to their family and friends from early in their relationship and that they attended social activities as a couple.

25. The Tribunal finds that the parties have subsequently held themselves out to the relevant authorities as being a couple.
26. The Tribunal finds that the parties represent themselves as a couple, planning their social activities on this basis from the time they committed to each other and continue to do so. The Tribunal gives significant weight to the social aspects of the relationship. It is clear from the evidence that the parties are seen as a couple, even when apart and are recognised by family and friends as being a couple.
27. *Nature of persons' commitment to each other*
28. The applicant states that she met the sponsor in person when he was visiting Serbia for a family wedding. About 4 days later they began a relationship. The applicant told the Tribunal that she made a commitment when he returned in September 2012 after his tour but it was in December 2012 when the sponsor flew to Serbia to spend time with her during his off days that they committed to a life together to the exclusion of all others.
29. The sponsor's mother thought that at the time it was a mere holiday romance but they kept in constant contact with each other. She indicated to the Tribunal that even though the applicant and sponsor had committed to each other, it was not until the applicant arrived in Australia in April 2013 that it clicked with her that this was more than a holiday romance and her son and the applicant were in a committed relationship.
30. The parties continue to be in a relationship at the time of this decision, a period of 2 ½ years. The parties have booked a civil wedding in the Registry of Births Deaths and Marriages in Western Australia to be held on 17 July 2015. They will also return to Serbia for celebration of their marriage according to their faith and culture.
31. Considerable evidence was provided of the regular communication between the parties via electronic means such as telephone, skype and Facebook when they are apart.
32. The sponsor has travelled to spend time with the applicant when possible taking into consideration work and financial commitments and the sponsor has travelled to Australia when possible taking into consideration work and financial commitments. When not living together, the evidence indicates they spend considerable time communicating via electronic means.
33. The parties told the Tribunal that they have plans for their future and those plans include getting married, celebrating in Serbia, buying a home and having children. The Tribunal finds no evidence to doubt the parties' claims in respect of these matters and finds indeed that the parties are genuine in holding these plans for their future.
34. After considering all the evidence before it, the Tribunal finds the parties are committed to each other to the exclusion of all others and have been since December 2012. From their evidence, and from the evidence of the declarants who have provided sworn statements attesting to the relationship, the Tribunal finds that the parties derive emotional support and companionship from each other, have done so since December 2012 and have continued to do so.
35. On all the evidence before the Tribunal, the Tribunal finds that at the time of application the parties have a mutual commitment to the relationship to the exclusion of all others, they draw

emotional support and companionship from it and they view the relationship as a long term and continuing one and that this continues at the time of decision.

36. On the basis of the evidence before it, the Tribunal finds that the parties have been in a committed relationship since December 2012 and that their relationship is exclusive. The Tribunal also finds that the parties since December 2012 have lived together and have lived apart at times due to the circumstances of both living in different countries. However the Tribunal is satisfied on the evidence that the parties did not intend to live separately and apart on a permanent basis.
37. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time of application decision.

ARE THE ADDITIONAL CRITERIA FOR A DE FACTO RELATIONSHIP MET?

38. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. These are: that the couple are both at least 18 years of age; and with limited exceptions, that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application, unless he or she can establish compelling and compassionate circumstances for the grant of the visa. The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009, where the de facto relationship has been registered under a relevant State or Territory law: r.2.03(4), (5).
39. The Tribunal is satisfied on the evidence before it that at the time of application both parties were at least 18 years of age.
40. The delegate indicated that they did not feel that the parties would satisfy the requirements of s5CB(2)(c) for a de facto relationship at the time of application as they did not believe the parties had lived together for the required 12 month period prior to the lodging of the application. The Tribunal has considered the provision in s5CB(2)(c)(ii) which provides an alternative to the 12 month cohabitation rule, namely, that the parties may be able to satisfy the rule if they had not been living separately and apart on a permanent basis, having regard to r1.09A.
41. The Tribunal is satisfied on the evidence before it, that the applicant and sponsor meet the requirements of r.2.03A(3) because their mutual commitment to a genuine and continuing relationship as a shared life as husband and wife to the exclusion of all others began around December 2012 when the parties began cohabitating. The Tribunal finds that for the period from December 2012 to December 2013 which embraces the date 12 months before the lodgement of the application the applicant and the sponsor were living separately and apart but not on a permanent basis.
42. The Tribunal finds the parties' relationship was such that they were in daily contact during periods when they were physically apart. The Tribunal accepts the evidence from the parties that at this time they had a mutual commitment to a genuine and continuing relationship as a shared life as husband and wife to the exclusion of all others.
43. The Tribunal is satisfied that for the period of 12 months immediately preceding the date of application the parties had either been living together, or not been living separately and apart on a permanent basis. Furthermore, the Tribunal is satisfied that in the 12 months immediately preceding the date of application, they had a mutual commitment to a shared life to the exclusion of all others and the relationship between them was genuine and

continuing. Accordingly the Tribunal finds that the applicant and sponsor satisfy the requirements of r.2.03A(3).

44. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.

CONCLUSIONS

45. The Tribunal finds that at the time of application the applicant was the de facto partner of a person who is an Australian citizen, that the applicant was sponsored by that person and the sponsor was not prohibited from being a sponsoring partner under cl.820.211(2B). The Tribunal finds that at the time the application was lodged, the applicant was the holder of a substantive visa. Accordingly, the Tribunal finds that the applicant meets cl.820.211(2)(a), (c) and (d).
46. The Tribunal finds that the applicant continues to meet the requirements of cl.820.211(2) at the time of this decision. Therefore the applicant satisfies cl.820.221.
47. The Tribunal will return the visa application to the Department for reconsideration in accordance with the Tribunal's directions. If the applicant meets the remaining criteria, the applicant will be entitled to the grant of a subclass 820 visa.

DECISION

48. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211 and cl.820.221 of Schedule 2 to the Regulations
 - r.2.03A

Amanda Goodier
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).